Supreme Court, U.S.
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No. 94-1254

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHIRLEY M. RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the dismissal of petitioner's complaint, which alleged that the Army violated the Due Process Clause when it limited her staff privileges as an anesthesiologist at Womack Army Community Hospital and reported that action to the National Practitioner Data Bank.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bates v. *Sponberg*, 547 F.2d 325 (6th Cir. 1976)	8
Board of Curators v. *Horowitz*, 435 U.S. 78 (1978)	7
King v. *Higgins*, 702 F.2d 18 (1st Cir.), cert. denied, 464 U.S. 965 (1983)	8
Lojeski v. *Boandl*, 788 F.2d 196 (3d Cir. 1986)	8
Rosenberg v. *Commissioner of Internal Revenue*, 450 F.2d 529 (10th Cir. 1971)	8
Shidaker v. *Carlin*, 782 F.2d 746 (7th Cir. 1986), cert. granted and judgment vacated, 481 U.S. 1001 (1987)	8
Service v. *Dulles*, 354 U.S. 363 (1957)	7
United States v. *Caceres*, 440 U.S. 741 (1979)	8
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954)	7
Vitarelli v. *Seaton*, 359 U.S. 535 (1959)	7
Wells v. *Hico Indep. Sch. Dist.*, 736 F.2d 243 (5th Cir. 1984), cert. dismissed, 473 U.S. 901 (1985)	8
Woodard v. *Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243 (5th Cir. 1984)	8

Constitution, statutes and regulations:

U.S. Const. Amend. V	5
10 U.S.C. 1102(g)	6
Army Reg. 40-68:	
para. 4-2*a*(4)*(b)*	2
para. 4-9*a*(1)	2
para. 4-9*a*(3)	2
para. 4-9*e*(2)	4, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 30 F.3d 518. The opinion of the district court (Pet. App. B1-B35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1994. A petition for rehearing was denied on August 22, 1994. Pet. App. D1-D2. By order of November 10, 1994, Chief Justice Rehnquist granted an extension of time for the filing of a petition for a writ of certiorari to and including December 20, 1994. The petition for a writ of certiorari was filed on December 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

STATEMENT

1. Petitioner, a former United States Army physician, entered the Army in June, 1984. After serving assignments at several Army medical installations, petitioner was assigned to Womack Army Community Hospital (Womack) at Ft. Bragg, North Carolina, where she reported for duty on January 10, 1990. In accordance with Army regulations, petitioner received provisional medical privileges to practice anesthesiology with qualified supervision for a period of 365 days. Pet. App. A3-A4.

Under the Army's regulations, a physician's "[f]ailure to attain and retain required proficiency levels for defined privileges by the end of the provisional period * * * require[s] an evaluation as to whether revocation or permanent restriction of privileges is appropriate." Pet. App. A4-A5 (quoting Army Regulation (AR) 40-68, para. 4-2*a*(4)(*b*)). The Army may restrict a physician's privileges based upon reasonable cause to doubt his or her competence to practice, including a single act of gross negligence, a pattern of substandard care, or any other cause related to patient safety. AR 40-68, para. 4-9*a*(1) and (3).

During 1990, petitioner demonstrated numerous instances of poor medical judgment, including administering an incorrect dosage of an anesthetic drug to a surgical patient, which apparently caused the patient's heart to stop beating. Gov't C.A. Br. 14. On another occasion, petitioner left the operating room during the course of a procedure while the patient's anesthesia was wearing off. In another case, petitioner failed to have a patient's blood typed or to call for additional blood for use in the operating room in case of emergency. Pet. App. A5-A6.

On December 9, 1990, petitioner received notice that the Womack Credentials Committee would conduct a hearing to explore allegations that she was not qualified to practice as an independent anesthesiologist and to consider an adverse action regarding her privileges. On January 8, 1991, petitioner, accompanied by her legal counsel, appeared at the Credentials Committee hearing. During the hearing, petitioner called and questioned witnesses and presented evidence intended to rebut the allegations of substandard care and deficient knowledge. Following the hearing, on January 22, 1991, the Credentials Committee recommended that petitioner receive provisional privileges with supervision for a period of five months, and gave petitioner notice of its determination. Pet. App. A6. On May 1, 1991, petitioner tendered her resignation from the Army, which became effective August 22, 1991. *Id.* at A6-A7 & n.2.

At the conclusion of the five-month provisional period, on July 11, 1991, the Credentials Committee met again to consider petitioner's staff privileges. It voted to recommend to the Commander at Womack that petitioner's practice be limited to simple anesthetics without supervision and complex cases with supervision, due to her "inability to practice as an independent anesthesiologist." Pet. App. A7-A8. Once approved by the Commander, this action would constitute a restriction upon the clinical privileges of a health care practitioner and be reportable to the National Practitioner Data Bank maintained by the Secretary of Health and Human Services. *Id.* at A8. Petitioner received written notification of the Committee's decision, which included notice of the right to request a hearing and notice that failure to request a hearing in writing within ten days of receipt of the notice or a failure to appear at a requested hearing would waive petitioner's right to a hearing and

the right to appeal the action to higher medical authorities within the Army. *Ibid.*; see AR 40-68, para. 4-9*e*(2).

Upon receipt of this notice, petitioner requested a hearing, which initially was scheduled for August 13, 1991. After receiving notice of the hearing date, petitioner requested and obtained a postponement until August 26, 1991. After petitioner failed to appear on the hearing date, the Committee rescheduled the hearing for September 9, 1991, at which time petitioner again failed to appear. The Committee rescheduled the hearing for September 27, 1991. On September 26, 1991, petitioner informed the Committee in writing that, because her resignation from the Army had become effective on August 22, 1991, she would not attend the hearing "without compensation." Pet. App. A8-A10, B10.

On September 27, 1991, the Committee met and recommended that petitioner's privileges be limited. The Committee recommended that petitioner be permitted to perform anesthesia in simple cases without supervision, but that she be supervised in complex cases. Petitioner did not attend the hearing. The Committee forwarded its recommendation to the Commander of Womack Hospital, who subsequently approved it. Pet. App. A10.

On March 23, 1992, in accordance with an agreement between the Department of Defense and the Secretary of Health and Human Services, the Army submitted an adverse action report to the National Practitioner Data Bank describing the privileging action taken with respect to petitioner as "Restriction of clinical privileges-Incompetence." Pet. App. A11.[1]

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[1] The Army's Office of the Surgeon General subsequently issued a new adverse action report replacing the language contained in the initial report with the following: "Practitioner

2. a. Petitioner brought this suit in the United States District Court for the Eastern District of North Carolina. Petitioner alleged that, in refusing to grant her privileges to perform as an anesthesiologist without supervision in complex cases and in reporting that action to the National Practitioner Data Bank (NPDB), the Army violated her substantive and procedural due process rights under the Fifth Amendment. Pet. App. A11-A12. Petitioner sought declaratory and injunctive relief barring the government from disseminating further information about her, and requiring that the NPDB report be withdrawn. See *id.* at E51-E56. Petitioner also sued the Commander of Womack Hospital and the Chairman of its Credentials Committee for damages. See *id.* at B13-B14, B15. On May 20, 1993, the district court granted the government's motion to dismiss the complaint against the government and against the individual defendants. *Id.* at B35.

b. The court of appeals affirmed. Pet. App. A1-A22. In rejecting petitioner's claim that the Army's actions violated substantive due process, the court reasoned that petitioner lacked any protected property interest in acquiring medical staff privileges at an Army hospital and that she had relinquished any claim to such a right by voluntarily resigning from the Army. *Id.* at A16-A17. The court also concluded that any damage to petitioner's reputation resulting from the Army's action did not constitute a deprivation of liberty under the Fifth Amendment. *Id.* at A17-A18. Finally, the court of appeals held that petitioner had waived any Fifth Amendment substantive due process claim by failing to

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failed to demonstrate the clinical ability or knowledge to practice anesthesiology without supervision for patients rated ASA Classes 3-5." Pet. App. A11 n.4.

appear at the hearing that led to the Army's actions. *Id.* at A18.

The court of appeals also rejected petitioner's procedural due process claim. Pet. App. A18-A21. It concluded that petitioner had received adequate notice of the basis for the Army's proposed action, particularly given her participation at the January 8, 1991 hearing involving essentially the same facts and allegations. *Id.* at A19. The court rejected petitioner's contentions that she had a right to attend preliminary meetings that preceded the Army's action and that she was deprived of a right to counsel. *Id.* at A18-A21. In addition, the court of appeals held that, by failing to participate in the hearing process, petitioner had waived her right to object to the procedures that the Army followed. *Id.* at A20.

Finally, the court of appeals affirmed the dismissal of the complaint against the individual Army officials because petitioner had not shown a violation of an established constitutional right, because these defendants were entitled to immunity under statutory law protecting persons who participate in the creation of medical quality assurance records (10 U.S.C. 1102(g)), and because the Army officers were immune from suits brought by inferior officers. Pet. App. A21-A22.

ARGUMENT

Petitioner asserts (Pet. 30, 35) that the court of appeals' decision conflicts with decisions of this Court which hold that the government is bound by its own validly prescribed regulations. This contention misconstrues the decision below. The court of appeals upheld the dismissal of petitioner's procedural due process claim because the court determined that petitioner received adequate notice of the basis for the

Army's proposed action. Pet. App. A19. Alternatively, the court held that petitioner had waived her right to object to the process she received by failing to attend the hearing she had requested. *Id.* at A20. Thus, the court of appeals had no occasion to reach the question whether the Army violated due process because the written notice petitioner received did not satisfy applicable Army regulations.

Even if the decision below could be read to hold that the Army failed to follow its procedural regulations, petitioner errs in suggesting (Pet. 30, 35) that there is any conflict with decisions of this Court. Petitioner cites cases (Pet. 30-31) holding that validly prescribed regulations are binding on the government. *Service* v. *Dulles*, 354 U.S. 363, 372 (1957); see also *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). But, as this Court repeatedly has observed, the cases on which petitioner relies "enunciate principles of federal administrative law rather than of constitutional law." *Board of Curators* v. *Horowitz*, 435 U.S. 78, 92 n.8 (1978); see also *Vitarelli*, 359 U.S. at 547 (Frankfurter, J., concurring in part and dissenting in part) (describing rule of *Service* v. *Dulles* as a "judicially evolved rule of administrative law"). Thus, an agency's failure to follow its regulations does not per se constitute a violation of the constitutional rights of the affected party.[2] See

[2] Upon a finding that administrative regulations or policies were not followed in reaching a particular agency action, this Court has ordered reversal of the action under review. See, *e.g.*, *Service* v. *Dulles*, 354 U.S. at 388 (reversing petitioner's dismissal from the Foreign Service); *Accardi* v. *Shaughnessy*, 347 U.S. at 268 (reversing denial of application for suspension of deportation). Under those cases, petitioner would be entitled only to be reinstated as an Army physician subject to the same privileges she

United States v. *Caceres*, 440 U.S. 741, 751-752 (1979) (holding that use at criminal trial of evidence obtained in violation of IRS regulations did "not raise any constitutional questions").

The decisions of the courts of appeals upon which petitioner relies in support of a claimed conflict (Pet. 37-38 n.6) likewise stand only for the limited proposition that, as a matter of administrative law, an agency is bound by its own regulations. See, *e.g.*, *Lojeski* v. *Boandl*, 788 F.2d 196, 199 (3d Cir. 1986); *Woodard* v. *Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1244-1245 (5th Cir. 1984); see also *Shidaker* v. *Carlin*, 782 F.2d 746, 751 (7th Cir. 1986), cert. granted and judgment vacated, 481 U.S. 1001 (1987); *Wells* v. *Hico Indep. Sch. Dist.*, 736 F.2d 243, 253 n.13 (5th Cir. 1984), cert. dismissed, 473 U.S. 901 (1985); *King* v. *Higgins*, 702 F.2d 18, 20-21 (1st Cir.), cert. denied, 464 U.S. 965 (1983); *Bates* v. *Sponberg*, 547 F.2d 325, 329-330 (6th Cir. 1976); *Rosenberg* v. *Commissioner of Internal Revenue*, 450 F.2d 529, 532-533 (10th Cir. 1971).

At all events, the court of appeals correctly determined that petitioner received constitutionally sufficient due process. Petitioner attended and participated in the January 8, 1991 Credentials Committee hearing, and therefore was fully apprised of the nature of the allegations against her. Before any final adverse action regarding her privileges was taken in the summer of 1991, petitioner received notice that the Army would be reviewing an allegation of "an inability to practice as an independent anesthesiologist." Pet. App. I1. That notice also informed petitioner that she had the right to be advised by legal counsel at the hearing, to present

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enjoyed before the adverse privileging action. Petitioner's complaint did not seek such relief. See Pet. App. E51-E56.

evidence, and to cross-examine witnesses against her. *Ibid.* In addition, under the Army's regulations, a "[f]ailure to request a hearing or failure to appear at the hearing, absent good cause, constitutes waiver of a hearing and appeal rights." AR 40-68, para. 4-9*e*(2). Petitioner's failure to appear at the Army's hearing, despite repeated notifications and rescheduling, precludes her procedural due process claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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